BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES EARL BRYANT	)	
Claimant	)	
	)	
VS.	)	
	)	
MIDWEST STAFF SOLUTIONS, INC.	)	
Respondent	)	Docket No. 1,010,656
	)	
AND	)	
	)	
LUMBERMENS UNDERWRITING	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the February 21, 2007 Award by Administrative Law Judge Steven J. Howard. The Board heard oral argument on May 23, 2007.

APPEARANCES

John J. Bryan of Topeka, Kansas, appeared for the claimant. J. Scott Gordon of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) determined claimant suffered accidental injury on May 13, 2003, arising out of and in the course of his employment with respondent. The ALJ awarded claimant compensation based upon a 15 percent functional impairment until September 8, 2005, followed by a 45.35 percent work disability until November 9, 2005, and a 28.5 percent work disability thereafter.

The respondent requested Board review and argues the claimant did not meet his burden of proof to establish he suffered accidental injury arising out of and in the course

of employment. Respondent contends that claimant's back condition is the natural consequence of a preexisting failed back syndrome from his back surgery in 1998 as demonstrated by the ongoing back treatment claimant received up until the alleged injuries. In the alternative, if the claim is found compensable, respondent argues claimant would only be entitled to a 15 percent functional impairment because he returned to accommodated work with respondent earning at least 90 percent of his pre-injury wage. Respondent further argues claimant voluntarily left the accommodated job to pursue other employment and that decision was unrelated to his injury. Finally, respondent contends the ALJ erred in computation of claimant's pre-injury and post-injury average weekly wage while working in the accommodated job with respondent as well as his subsequent employment.

Conversely, claimant argues he suffered a work-related aggravation and intensification of his preexisting back condition which was corroborated by the doctors' uncontradicted testimony. Claimant further argues he is entitled to a 39.60 percent work disability based upon a 48.86 percent task loss and a 30.35 percent wage loss. Claimant also argues the 10 percent deduction in preexisting impairment should not be deducted twice (from functional impairment and work disability).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

On March 2, 2003, through May 13, 2003, claimant was working for Shawnee Heating and Cooling through respondent, Midwest Staff Solutions. He was employed with Shawnee Heating and Cooling as a heating and air conditioning technician. His job duties required him to service and install residential furnaces and air conditioners. On March 2, 2003, claimant was working on a furnace. He twisted to grab a tool from his tool bag and felt a pulling in his low back.

Claimant advised his supervisor and then called his chiropractor, Dr. James Anderson and told him that he needed treatment but was unable to make it to the office. Dr. Anderson drove to claimant's house, provided minor treatment and instructed claimant to see a medical doctor. Claimant then went to the office of his family physician, where he was seen by Ann Cooper, advanced registered nurse practitioner (ARNP), who referred him to Dr. Glenn M. Amundson.

Claimant was able to return to work but he performed limited duty. He was provided a helper who did the more physical work. Between March 2 and May 13, 2003, claimant never worked over 22.5 hours in one week. He last worked on May 13, 2003. On that date he and his helper were setting an air-conditioner. "And when I was bent over welding it up

I just felt it getting real bad, the back worsening."[1] That same day claimant had a conversation with Kevin, one of the owners. Claimant told him he was leaving work before his shift was over because he was hurting pretty bad and could not continue working.

Although claimant has a history of back problems, and was receiving on-going chiropractic treatment, he was able to work on a regular basis until March 2, 2003. Before that date he had days and weeks when he was completely pain free. Since March 2, 2003, he has never been pain free. Before March 2, 2003, claimant's chiropractor had never told him that he could not treat him and that he needed to see a medical doctor. Although he had continued to follow up or treat with Dr. Robert M. Beatty after his October 1998 surgery, nonetheless, before March 2, 2003, claimant said no doctor had recommended another surgery. On cross examination, however, claimant acknowledged that in the year 2000 Dr. Beatty had recommended he consider fusion surgery because of back complaints he was having at that time.

Dr. Amundson recommended a two-level fusion. At respondent's request, claimant was evaluated by Dr. Jeffrey T. MacMillan and he has made the same treatment recommendation. Claimant denies suffering any injuries off the job at any time since March 2, 2003. Claimant acknowledged that he missed work during February 2003 due to back pain. He also acknowledged telling Dr. Campbell's nurse practitioner on March 3, 2003, that he had been experiencing back pain for two weeks and that he had gotten worse. Although claimant believes he told the nurse practitioner of a specific March 2, 2003 accident, he has no explanation for why her records contain no mention of it.

On September 23, 2003, claimant underwent lumbar surgery performed by Dr. Amundson consisting of a diskectomy at L4-5 and L3-4; a fusion at L4-5 and L3-4; and a redo of the decompression at L3, L4 and L5. Claimant returned to an accommodated job as a dispatcher with Shawnee Heating and Cooling in March 2004. The claimant's hourly rate decreased to $20 but the job included overtime.

Dick Santner, a vocational rehabilitation counselor, conducted a personal interview with claimant on August 22, 2005, at the request of claimant's attorney. Mr. Santner developed a list of job tasks the claimant had performed in the 15 years before his accidental injury. Mr. Santner compiled a list of 31 non-duplicative tasks.

Mary Titterington, a vocational rehabilitation counselor, conducted a personal interview with claimant on September 5, 2006, at the request of respondent's attorney. She prepared a task list of 26 non-duplicative tasks claimant performed in the 15-year period before his injury. Ms. Titterington opined that claimant had the ability to earn from $16.50 to $20 an hour.

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[1] P.H. Trans. at 9.

Dr. Vito Carabetta, board certified in physical medicine and rehabilitation, performed a court ordered independent medical evaluation of the claimant. Dr. Carabetta rated the claimant using the AMA *Guides*[2] and based upon the DRE Lumbosacral Category V opined claimant suffered a 25 percent permanent partial functional impairment. But Dr. Carabetta further opined claimant had a preexisting Category III 10 percent functional impairment. Consequently, the doctor concluded claimant suffered an additional 15 percent functional impairment as a result of his work-related accident with respondent. Dr. Carabetta imposed restrictions that claimant's maximum occasional lifting be limited to no more than 50 pounds. Maximum frequent lifting or carrying should not exceed 25 pounds and claimant should only occasionally participate in any bending or stooping activities. Dr. Carabetta reviewed the list of claimant's former work tasks prepared by Ms. Titterington and concluded claimant could no longer perform 11 of the 26 non-duplicative tasks for a 42 percent task loss. Dr. Carabetta reviewed the list of claimant's former work tasks prepared by Mr. Santner and concluded claimant could no longer perform 16 of the 31 non-duplicative tasks for a 52 percent task loss.

At the request of claimant's attorney, the claimant was examined on December 15, 2004, by Dr. Theodore L. Sandow Jr., a board certified orthopedic surgeon. The doctor opined that the claimant has a 25 percent permanent partial functional impairment based upon DRE Lumbosacral Category V of the AMA *Guides* but 10 percent was preexisting. Dr. Sandow imposed permanent restrictions that claimant should avoid repetitive bending, stooping, twisting, climbing, kneeling or crawling. Dr. Sandow suggested claimant should sit the majority of the time with the ability to change positions frequently and not lift over 35 pounds. Dr. Sandow reviewed the list of claimant's former work tasks prepared by Mr. Santner and concluded claimant could no longer perform 17 of the 31 non-duplicative tasks for a 55 percent task loss.

Initially, the respondent argues claimant failed to meet his burden of proof to establish that he suffered accidental injury arising out of and in the course of employment. This argument is premised upon the fact that claimant had back surgery in 1998 and continued to receive intermittent treatment, including a recommendation for additional back surgery, in the following years. Consequently, respondent further argues claimant's need for back surgery in 2003 was a natural and probable consequence of his preexisting back condition.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the

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[2] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

affliction.[3] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[4]

After the claimant had back surgery in 1998 he was able to return to work. He then had the incidents at work in March and May 2003 which he described as causing a significant worsening and intensification of his back complaints. Dr. Carabetta described the March incident as an instigating event that changed claimant's relatively stable back condition, controlled by intermittent treatment, into a situation that required surgery. Dr. Sandow likewise agreed that the incidents at work were the triggering mechanisms that led to the surgery in 2003. The claimant has met his burden of proof to establish that he suffered aggravation, acceleration and intensification of his preexisting back condition as a result of the work-related incidents in March and May 2003. The Board affirms the ALJ's finding claimant suffered accidental injury arising out of and in the course of his employment.

Drs. Carabetta and Sandow, using the AMA *Guides* and based upon the DRE Lumbosacral Category V, opined claimant suffered a 25 percent permanent partial functional impairment. Both doctors further agreed that 10 percent was preexisting. Under K.S.A. 44-501(c), awards are reduced by the amount of preexisting functional impairment when a preexisting condition is aggravated. That statute provides:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

Consequently, the claimant has met his burden of proof that he suffered a 15 percent whole person permanent partial functional impairment as a result of the injuries suffered March 2 and May 13, 2003.

Respondent next argues claimant should be limited to an award of compensation based upon the percentage of his functional impairment because he returned to an accommodated job making 90 percent or more than his pre-injury weekly wage and left that job for other employment.

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[3] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[4] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

Because claimant has sustained an injury that is not listed in the "scheduled injury" statute, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a). That statute provides, in pertinent part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[5] and *Copeland*.[6] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual wage being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work injury.[7] "If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages." [8]

After claimant's back surgery he returned to work at an accommodated dispatcher position. Although his hourly wage was reduced from $22 to $20 he continued to work overtime. The claimant continued working at the dispatcher job until November 9, 2005. But starting in mid-September 2005, the number of hours the claimant worked decreased significantly due to a seasonal lack of work. Consequently, claimant began looking for

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[5] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 *rev. denied* 257 Kan. 1091 (1995).

[6] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[7] An analysis of a worker's good faith effort to find appropriate employment after recovering from the work injury for purposes of the wage loss prong of K.S.A. 44-510e may no longer be applicable as our Supreme Court has recently said that statutes must be interpreted strictly and nothing should be read into the language of a statute as was done in *Foulk* and *Copeland.* See *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *rev. denied* (May 8, 2007); and *Graham v. Dokter*, 284 Kan. 547, 161 P.3d 695 (2007).

[8] *Copeland* at 320.

employment that would provide a consistent 40-hour work week as he was unsure when the hours he worked as a dispatcher would return to normal. Claimant found a job that guaranteed a 40-hour work week and paid $16.50 an hour. The new job also had the advantage of possible advancement which his accommodated dispatcher job had lacked. The claimant quit working for respondent and immediately started work at his job with Excelsior. Claimant quit the job with Excelsior in August of 2006 to go back to work for his father.

In order to determine whether claimant is entitled to a work disability or limited to his functional impairment there must be a comparison of his pre-injury average gross weekly wage and his post-injury average gross weekly wage. K.S.A. 44-511(b)(4) provides for the determination of the average gross weekly wage in the following manner:

> If at the time of the accident the employee's money rate was fixed by the hour, the employee's average gross weekly wage shall be determined as follows: (A) If the employee was a part-time hourly employee, as defined in this section, the average gross weekly wage shall be determined in the same manner as provided in paragraph (5) of this subsection; (B) if the employee is a full-time hourly employee, as defined in this section, the average gross weekly wage shall be determined as follows: (I) A daily money rate shall first be found by multiplying the straight-time hourly rate applicable at the time of the accident, by the customary number of working hours constituting an ordinary day in the character of work involved; (ii) the straight-time weekly rate shall be found by multiplying the daily money rate by the number of days and half days that the employee usually and regularly worked, or was expected to work, **but 40 hours shall constitute the minimum hours for computing the wage of a full-time hourly employee**, unless the employer's regular and customary workweek is less than 40 hours, in which case, the number of hours in such employer's regular and customary workweek shall govern; (iii) the average weekly overtime of the employee shall be the total amount earned by the employee in excess of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the accident, or during the actual number of such weeks the employee was employed if less than 26 weeks, divided by the number of such weeks; and (iv) the average gross weekly wage of a full-time hourly employee shall be the total of the straight-time weekly rate, the average weekly overtime and the weekly average of any additional compensation. (Emphasis Added)

As claimant was a full-time employee, even though he may have occasionally worked less than a 40-hour week, the average gross weekly wage is calculated using the straight time hourly rate times 40 and then adding the average overtime. The parties stipulated claimant's base wage was $880 which was the claimant's straight time hourly rate multiplied times 40 hours. The ALJ then added claimant's average weekly overtime for the 26 weeks preceding the May 13, 2003 date of accident which calculated to $33.66. This results in an average gross weekly wage of $913.66 on the date of accident.

The ALJ also included $21.60 in the calculation of the average gross weekly wage. This amount represented the weekly monetary value claimant received from use of a truck respondent provided to him to get to and from work. K.S.A. 44-511(a)(2) provides:

> The term "additional compensation" shall include and mean only the following: (A) Gratuities in cash received by the employee from persons other than the employer for services rendered in the course of the employee's employment; (B) any cash bonuses paid by the employer within one year prior to the date of the accident, for which the average weekly value shall be determined by averaging all such bonuses over the period of time employed prior to the date of the accident, not to exceed 52 weeks; © board and lodging when furnished by the employer as part of the wages, which shall be valued at a maximum of $25 per week for board and lodging combined, unless the value has been fixed otherwise by the employer and employee prior to the date of the accident, or unless a higher weekly value is proved; (D) the average weekly cash value of remuneration for services in any medium other than cash where such remuneration is in lieu of money, which shall be valued in terms of the average weekly cost to the employer of such remuneration for the employee; and (E) employer-paid life insurance, health and accident insurance and employer contributions to pension and profit sharing plans. In no case shall additional compensation include any amounts of employer taxes paid by the employer under the old-age and survivors insurance system embodied in the federal social security system. **Additional compensation shall not include the value of such remuneration until and unless such remuneration is discontinued. If such remuneration is discontinued subsequent to a computation of average gross weekly wages under this section, there shall be a recomputation to include such discontinued remuneration.** (Emphasis Added)

The use of the truck to get to and from work was not discontinued until after the date of accident and so cannot be included in the calculation of the pre-injury average gross weekly wage. Consequently, the claimant's average gross weekly wage was $913.66 on the date of accident. The ALJ's Award is modified accordingly.

As previously noted, as long as claimant is making post-injury wages equal to 90 percent or more of his pre-injury wages he is limited to compensation for his functional impairment. This requires a comparison of the pre-injury average gross weekly wage with the post-injury average gross weekly wage. From mid-September 2005 until he left work with respondent in November 2005 the claimant suffered a significant decrease in his actual weekly take home pay because of the significant reduction in his hours worked. But K.S.A. 44-511 makes no distinction between pre-injury or post-injury average gross weekly wage and the calculation for either would be the same.[9] Although the result may appear harsh nonetheless that is what the statute requires in order to compare "apples to apples."

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[9] *Fuller v. Farmers Ins. Co.*, 32 Kan. App. 2d 333, 82 P.3d 526 (2004).

When claimant returned to work at the dispatcher position he was paid $20 an hour. Accordingly, his base wage was $800 a week. In the 26-week period before he left his employment with respondent he worked 38.75 hours of overtime which averages to $44.71 a week. Consequently, claimant's post-injury average gross weekly wage calculates to $844.71. As previously determined the claimant's pre-injury average gross weekly wage was $913.66. But when he returned to his accommodated job as a dispatcher he was no longer provided a truck to get to and from work. Consequently, a recalculation of his pre-injury average gross weekly wage is required to include the discontinued additional compensation of $21.60 for the use of a truck. This increases his pre-injury average gross weekly wage to $935.26. But as claimant's post-injury average gross weekly wage of $844.71 is slightly more than 90 percent of claimant's recalculated pre-injury average gross weekly wage, the claimant's permanent partial general disability compensation is based on the percentage of his functional impairment during the time he worked the accommodated job as a dispatcher.[10]

But it must be noted that while claimant was still performing his post-injury accommodated job as a dispatcher, the employer continued to provide health insurance benefits until they were discontinued on October 28, 2005. The parties stipulated that the weekly value of the respondent provided health insurance coverage for claimant was $67 when this benefit was discontinued on October 28, 2005. A recalculation of claimant's average gross weekly wage to include the discontinued "additional compensation" in the amount of $67 per week for health insurance results in a pre-injury average gross weekly wage of $1,002.26. When compared to claimant's post-injury wage of $844.71 the claimant suffered a wage loss of 16 percent. Stated another way, the claimant was no longer making 90 percent or more of his pre-injury average gross weekly wage and was entitled to a work disability analysis.

The calculation of claimant's post-injury wage loss requires a snapshot approach. It would be illogical to not include the value of any additional compensation the claimant is actually receiving post-injury. And to determine any percentage of wage loss, the post-injury wage must include any items of additional compensation that claimant is receiving post-injury. Accordingly, when claimant's health insurance benefit was discontinued by respondent post-injury, his loss must be recalculated against his pre-injury average gross weekly wage which now includes that benefit and his actual post-injury wage which now does not include that benefit.

In summary, the claimant is limited to his 15 percent permanent partial functional impairment from the time he returned to the accommodated dispatcher job until October 28, 2005, when his health insurance was discontinued and recalculation of his pre-injury average gross weekly wage resulted in a wage loss greater than 10 percent of his

[10] See K.S.A. 44-510e(a).

pre-injury average gross weekly wage. At that time claimant became entitled to a work disability analysis.

As previously noted, Dr. Carabetta reviewed the list of claimant's former work tasks prepared by Ms. Titterington and concluded claimant could no longer perform 11 of the 26 non-duplicative tasks for a 42 percent task loss. Dr. Carabetta reviewed the list of claimant's former work tasks prepared by Mr. Santner and concluded claimant could no longer perform 16 of the 31 non-duplicative tasks for a 52 percent task loss. Dr. Sandow reviewed the list of claimant's former work tasks prepared by Mr. Santner and concluded claimant could no longer perform 17 of the 31 non-duplicative tasks for a 55 percent task loss. The Board finds claimant has suffered a 49.66 percent task loss because it's the average of all the credible opinions.

Turning to the wage loss component of the work disability formula, the claimant suffered a 16 percent wage loss beginning October 29, 2005. Averaging the wage loss of 16 percent with the task loss of 49.66 results in a 32.8 percent work disability. But that must be reduced by the 10 percent preexisting impairment.[11] Consequently, claimant suffered a 22.8 percent work disability from October 29, 2005, through November 9, 2005.

But claimant left the accommodated dispatcher job for work with another company and that job resulted in a greater percentage of wage loss than if claimant had continued his employment as a dispatcher. Accordingly, respondent argues claimant did not demonstrate good faith in leaving the dispatcher job. The Board disagrees.

The claimant began looking for employment that would consistently provide a 40-hour work week as a result of his working fewer hours during a seasonal decline in business for respondent. It is undisputed that claimant worked fewer hours starting in September and made less money. Although the method of calculation of the post-injury average gross weekly wage, as required by the statute, resulted in an average gross weekly wage that precluded a work disability, nonetheless, for approximately nine weeks before claimant left work with respondent his actual gross weekly wage was significantly less than his statutorily calculated average gross weekly wage. This reduction in pay was a legitimate reason for claimant to seek other employment where he would consistently work 40 hours and make more money when compared to his actual weekly wage during the seasonal downturn in business with respondent. Under these circumstances, leaving work with respondent cannot be said to demonstrate bad faith where claimant left work for a job that immediately provided him with more take home pay. Consequently, claimant is entitled to a work disability analysis after leaving employment with respondent.

[11] K.S.A. 44-501(c).

When claimant went to work for Excelsior he was paid $16.50 an hour for a 40 hour work week.[12] This results in a base wage of $660. He also received $38.08 average weekly overtime. Adding the base wage and average weekly overtime results in an average gross weekly wage of $698.08. When compared to claimant's pre-injury average gross weekly wage of $1,002.26 the claimant has suffered a 30 percent wage loss. Averaged with the 49.66 percent task loss results in a 39.8 percent work disability. This percentage must be reduced by the 10 percent preexisting impairment which results in a 29.8 percent work disability commencing November 10, 2005.

The Board disagrees with claimant's argument that the preexisting impairment cannot be used to reduce both the functional impairment and the work disability. As previously noted K.S.A. 44-501(c), provides that "any" award of compensation shall be reduced by the amount of functional impairment determined to be preexisting. The statute contains no limitation that such reduction only be applied to either the functional or the work disability awards.

The Board is mindful claimant left his job with Excelsior but he has not met his burden of proof to establish that he engaged in a good faith effort to retain that job nor to obtain other employment. Accordingly, the Board will impute the wage claimant was making while working at Excelsior.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Steven J. Howard dated February 21, 2007, is modified to reflect claimant's average weekly wage was $913.66 and he is entitled to a 22.8 percent work disability from October 29, 2005 through November 9, 2005 and a 29.8 percent work disability thereafter.

The claimant is entitled to 44.60 weeks of temporary total disability compensation at the rate of $432 per week or $19,267.20 followed by 57.81 weeks of permanent partial disability compensation at the rate of $432.00 per week or $24,973.92 for a 15 percent functional disability followed by 1.71 weeks of permanent partial disability compensation at the rate of $432 per week or $738.72 for a 22.8 percent work disability followed by 55.33 weeks of permanent partial disability compensation at the rate of $432 per week or $23,902.56 for a 29.8 percent work disability, making a total award of $68,882.40.

As of December 21, 2007, there would be due and owing to the claimant 44.60 weeks of temporary total disability compensation at the rate of $432 per week in the sum

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[12] The ALJ used $17.50 an hour to calculate claimant's wage at Excelsior. Although the claimant testified that his wage at Excelsior was being raised to $17.50 an hour, Claimant's Exhibit 2 at the Regular Hearing established that claimant was paid $16.50 an hour the entire time he was employed by Excelsior.

of $19,267.20 plus 114.85 weeks of permanent partial disability compensation at the rate of $432 per week in the sum of $49,615.20 for a total due and owing of $68,882.40, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of December 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the opinion of the majority in the above matter with regard to the post-injury average weekly wage earned by claimant as a dispatcher after his work-related accident. The majority properly included in claimant's pre-injury average weekly wage, the value of the additional compensation from claimant's health insurance benefits when those benefits were discontinued on October 28, 2005. However, the Majority failed to include the value of the health insurance in the post-injury wage earned by claimant as a dispatcher. Under K.S.A. 44-511(a)(2) additional compensation is not included in a wage unless and until the remuneration is discontinued. K.S.A. 44-511 does not differentiate between wages earned before or after an accident. It clearly states that an employee's average gross weekly wage formula found in K.S.A. 44-511 shall be determined "for the purpose of computing any compensation benefits provided by the workers compensation act . . ." K.S.A. 44-511(b). The majority properly increased claimant's pre-injury wage from $913.66 to $1,002.26 after adding the value of the health insurance. But the majority did not include that health insurance value in the post injury wage. Had the majority done so, the value of claimant's post injury wage would have increased from $844.71 to $911.71. This would calculate to 90.96 percent of claimant's newly calculated pre-injury wage and claimant would be limited to his functional impairment

through November 9, 2005. The undersigned dissenting Board Member would modify the post-injury wage accordingly and limit claimant to his functional impairment through November 9, 2005.

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BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
J. Scott Gordon, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge